In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 857

JAMES MILLER, A/K/A FRANK JAMES COPPOLA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to petitioner's supplemental memorandum. For the reasons noted below, we submit that the claims advanced are irrelevant to the issues presently before the Court. Moreover, in light of petitioner's vigorous attack upon the district judge, we believe it appropriate to set that court's action in its proper context.

Having learned that, eighteen months after the verdict, private investigators employed by petitioner's counsel had begun interviewing members of the jury, the district court issued an order to show cause why further interrogation of the jurors should not be enjoined. Petitioner's counsel filed responses to this or-

der and a hearing was held. On the basis of affidavits submitted by petitioner, it appeared that an investigator employed by counsel had questioned eight or nine of the jurors (App. 6).[1] In at least one case, the investigator returned to question a juror who had indicated earlier that he did not wish to discuss the case (App. 18). Another juror became "'very angry' when [the investigator] paid him a return visit at his home on a weekend" (App. 18).

The district court framed the issue before it as follows (App. 11):

> The question presented is how to chart a course that permits jurors' testimony to be obtained to establish improper communications while at the same time insulating them from the harassment of unlimited post-trial inquiry.

The district judge concluded that, in order to prevent undue harassment of the jurors, the permission of the court should be required before an investigation is undertaken. He also suggested that it was preferable that any examination of the jurors should take place in open court. The court noted, however, that in some instances it might be appropriate to have the jurors examined by deposition.

Having decided that further out-of-court interrogation of the jurors should be terminated, the district court enjoined petitioner's counsel and his private investigator "from making any inquiry of any of the jurors who comprised the petit jury which heard and

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[1] References are to the district court's opinion, which is set forth as an Appendix to Petitioner's Supplemental Memorandum.

decided the above captioned case, except upon further order of the court" (App. 21). In making this ruling, however, the judge expressly noted that he was not passing on any claims by petitioner that he was entitled to a new trial because of improper communication to the jurors. He noted that petitioner was free on bail and that the case was pending in this Court. He, therefore, determined that further action on petitioner's motion for a new trial should be held in abeyance pending this Court's disposition of the petition for a writ of certiorari (App. 22).

It is evident that the district court has neither unreasonably restricted petitioner's ability to question the jurors about possible improper communications, nor passed on the merits of petitioner's claim that information gathered after the trial from the jurors and others shows that he is entitled to a new trial. All that the trial judge decided was that the jurors should not be harassed by further visits from petitioner's investigator and that if further interrogation of the jurors was necessary it should take place under the strict supervision of the district court. Thus, the decision has no bearing on issues that are ripe for consideration by this Court. Nor, we add, do the actions taken by the trial judge reflect upon his ability to conduct properly any further proceedings that may result from petitioner's motion for a new trial.

For the reasons stated herein and in our original brief in opposition in this cause, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD.
Solicitor General.

APRIL 1968.

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